STATE OF MICHIGAN

COURT OF APPEALS

BEIER HOWLETT PC,

Plaintiff-Appellee/Cross-Appellant,

v

POLICE AND FIRE RETIREMENT SYSTEMS OF THE CITY OF DETROIT and RDD INVESTMENT CORPORATION,

Defendants-Appellants/Cross-Appellees,

and

ENVIRONMENTAL DISPOSAL SYSTEMS, INC., REMUS JOINT VENTURE, and ROMULUS DEEP DISPOSAL LIMITED PARTNERSHIP,

Defendants.

UNPUBLISHED
June 10, 2014

No. 308688
Wayne Circuit Court
LC No. 10-004549-CK

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Defendants, Police and Fire Retirement Systems of the City of Detroit (PFRS) and RDD Investment Corporation (RDD) appeal as of right the trial court's opinion and order denying dismissal of plaintiff's claim for an equitable lien and the subsequent money judgment entered in plaintiff's favor as relief for that claim. Plaintiff, Beier Howlett, P.C., cross-appeals from the trial court's order denying it summary disposition on its equitable lien claim and from the trial court's order granting summary disposition in favor of PFRS and RDD on plaintiff's claims of conversion, violation of the Uniform Fraudulent Transfer Act, and conspiracy. Plaintiff further challenges the trial court's jury instructions and one of its evidentiary decisions. We vacate the trial court's December 21, 2011, Opinion and Order regarding an equitable lien and remand to the trial court for entry of an order granting summary disposition in favor of defendants on plaintiff's claim for an equitable lien. We affirm the remainder of the trial court's rulings.

The disputes in this matter arose over a hazardous waste deep well disposal site and efforts to bring the potentially profitable site into existence ("the project"). Defendant Remus Joint Venture ("Remus") owned a facility for the project and defendant Environmental Disposal Systems ("EDS") was the managing agent of Remus. PFRS invested heavily (over $40 million) in the project primarily in the form of loans and, according to plaintiff, exercised extensive control over the project. PFRS held a mortgage on the project's real property and EDS and Remus additionally assigned all of the project's future permits, licenses and approvals to operate the project to PFRS as security for PFRS's loans.

In 1995 Remus, through EDS as managing operator for Remus, hired plaintiff to perform legal services concerning the project. Plaintiff and EDS entered into a contingency fee agreement concerning plaintiff's services whereby Remus agreed to pay plaintiff a contingency fee of 20% of the gross amount of any and all money damages recovered or received by Remus and any of its successors and/or assigns with respect to the specific claims set forth in the agreement. Remus also agreed to pay plaintiff a percentage "of the net income of the well complex and the MT2 well complex up to a maximum of $500,000 for each complex . . . ." According to plaintiff, all defendants involved in the project were aware of the fee agreement and benefitted from plaintiff's services.

Plaintiff alleged that defendants failed/refused to pay plaintiff for services rendered and instead conspired with other defendants to transfer assets from EDS and/or Remus to RDD. Plaintiff thus brought suit against PFRS, RDD and others for, among other things, breach of contract, partnership liability, implied merger, and conversion. All but Count I "declaratory relief re: attorney lien" and Count IV "declaratory judgment as to successor liability" were resolved through summary disposition in favor of PFRS and RDD. The remaining two claims proceeded to jury trial, with the exception being that to the extent that Count I was deemed to set forth an equitable claim, that portion of the claim was to be resolved by the trial court after hearing trial testimony. The jury ultimately found that plaintiff did not have an attorney's lien (Count I) and that RDD and PFRS were not successor entities to EDS (Count IV). Thus, a judgment of no cause of action as to Counts I and IV of plaintiff's complaint was entered, consistent with the jury verdict.

On December 20, 2011, the trial court issued an opinion and order resolving plaintiff's claim for an equitable lien in its favor. The order further provided that a judgment would enter in favor of plaintiff and against defendants PFRS and RDD in the amount of $500,000 jointly and severally.

On appeal, PFRS and RDD (hereafter "defendants") first contend that trial on plaintiff's equitable lien theory and the trial court's decision to resolve the same were in error given that the trial court had previously dismissed Count II of plaintiff's complaint, which sought a declaratory judgment on an equitable lien and/or an equitable assignment. We disagree.

Essentially, defendants assert that the trial court erroneously allowed a claim which it had previously dismissed to proceed to trial. To the extent that this could be viewed as an erroneous grant of reconsideration, we review a trial court's decision concerning reconsideration for an abuse of discretion. *In re Moukalled Estate*, 269 Mich App 708, 713; 714 NW2d 400 (2006).

There are two types of liens that are specific to attorneys. A general, retaining, or possessory lien grants the attorney the right to retain possession of property of the client, including money and documents, until the fee for services is paid. *George v Sandor M. Gelman, P.C.*, 201 Mich App 474, 476; 506 NW2d 583 (1993). A retaining lien is not lost by transferring possession to either the court or another person pursuant to a court order. *Kysor Industrial Corp v D.M. Liquidating Co*, 11 Mich App 438, 446; 161 NW2d 452 (1968). Plaintiff did not and does not claim entitlement to a retaining lien.

A special or charging lien is "an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit." *George*, 201 Mich App at 476. The charging lien "creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services." *Id.* But the judgment, settlement or other money recovered must result from the attorney's services. *Id.;* see also *Reynolds v Polen*, 222 Mich App 20, 23; 564 NW2d 467 (1997). Attorney charging liens are not recognized by statute but exist in the common law. *George*, 201 Mich App at 477. "Michigan recognizes a common law attorney's lien on a judgment or fund resulting from the attorney's services." *Miller v Detroit Auto Inter-Ins Exch*, 139 Mich App 565, 568; 362 NW2d 837 (1984).

A different type of lien, different principally in that it is not limited to claims by attorneys, is an equitable lien. *Warren Tool Co v Stephenson*, 11 Mich App 274, 284 n 5; 161 NW2d 133 (1968). An equitable lien is defined as that which "arises from an agreement that both identifies property and shows an intention that the property will be security for an obligation." *In re Estate of Moukalled*, 269 Mich App at 719. Thus, it is also different from an attorney's charging lien in that it does not create a lien on a judgment, settlement or money recovered as a result of legal services. Where there is no written contract, an equitable lien will be established only where, through the relations of the parties, there is a clear intent to use an identifiable piece of property as security for a debt. *Id.* "An equitable lien cannot be imposed, however, if the proponent has an adequate remedy at law. *Id*., citing *Yedinak v Yedinak*, 383 Mich 409, 415; 175 NW2d 706 (1970); *Ashbaugh v Sinclair*, 300 Mich 673, 677; 2 NW2d 810 (1942).

Count I of plaintiff's first amended complaint is entitled "Declaratory Relief Re: Attorney Lien." The allegations in this count include statements of law concerning attorney liens at common law as well as specific statements that:

> "the existence of a common law attorney's charging lien is too well accepted in Michigan to be debated"
>
> "The charging or equitable lien of Beier Howlett as to any stream of revenue generated by the permits or licenses was superior to any claim . . . ."
>
> "Beier Howlett had a valid, common law, equitable and/or contractual attorney's lien pursuant to its contingency fee agreement . . . ."
>
> "In cases of actual controversy, this Court is permitted, pursuant to MCR 2.605, to declare the rights of the parties. In accordance with such rule, this Court should declare the following:

(a) the amount of Beier Howlett's lien;

(b) that the common law, contractual and/or equitable attorney lien rights of Beier Howlett are superior to any and all rights of others . . . .

Because Count I, references both an attorney's lien *and/or* an equitable lien, it could arguably be read to encompass claims for both an attorney's charging lien applicable solely to attorneys and attaching to a judgment, settlement or money recovered as a result of legal services as well as the more general equitable lien applicable to all and attaching to an identifiable piece of property as security for a debt.

Count II of plaintiff's complaint is entitled "declaratory judgment, equitable lien and/equitable assignment." In this count, plaintiff alleged that "Michigan law also recognizes the existence of equitable liens. The equitable lien doctrine applies to attorney liens." Plaintiff further set forth the definition of equitable liens in Count II of its complaint and asserted that the facts of this case fell within such definition.

In its November 10, 2011, Opinion and Order, the trial court opined that Count I "is premised, in part, on an equitable lien arising from the Agreement . . . ." The trial court further opined that "[a] review of Counts II and III of plaintiff's first amended complaint discloses that they are essentially duplicative of Count I of plaintiff's first amended complaint. Consequently, the Court will grant defendants' motions for partial summary disposition as to Counts II and III of plaintiff's first amended complaint." Clearly, the trial court did not dismiss plaintiff's claim for an equitable lien and/or equitable relief. It found that such a claim was encompassed in Count I, on which it denied summary disposition in defendants' favor. Moreover, at the start of trial, prior to the jury being selected, defense counsel stated, "[t]he parties have agreed that the equitable lien theory is not to be presented to the jury. We agreed to that." While counsel also stated, "defendants also object to instructing the jury at all with respect to the attorney's lien theory, given the Court's November 10 Opinion and Order converting that claim to an equitable lien" the allegations in Count I referenced *both* an attorney's lien and an equitable lien. The trial court thus did not "convert" the claim to an equitable lien.

Given the language in the complaint, the trial court did not err in allowing the equitable claim to proceed to trial. It had not, as defendants assert, been previously dismissed.

Defendants next assert that they were entitled to summary disposition on plaintiff's claim for an equitable lien. We agree.

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). A motion brought under MCR 2.116 (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). Summary disposition should be granted under subrule (C)(8) only when the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 305; 788 NW2d 679 (2010), quoting *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under (C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). If the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 362–363.

Plaintiff entered into a fee agreement with Remus (through EDS) on December 22, 1995, whereby plaintiff would provide specified legal services for Remus relative to its building and operation of a hazardous waste disposal well facility. In the agreement, Remus agreed to pay plaintiff a contingency fee of 20% of the gross amount of any and all money damages recovered or received by Remus and any of its successors and/or assigns with respect to the specific claims set forth in the agreement. Remus also agreed to pay plaintiff "for the following percentages of the net income of the well complex and the MT2 well complex up to a maximum of $500,000 for each complex:"

> 8% if only one such well complex is permitted to operate;
>
> or 5% if both well complexes are permitted to operate;
>
> Where such operations involve disposing of liquid waste at the time when the above representation is finally concluded under all applicable federal, state, and local permits, laws and ordinances. The $500,000 in fees payable for each well complex shall be paid out of net income (as earned) for each well complex. Such 5% (or 8%) interest shall terminate after payment of net income attributable to each operable well complex equal to $500,000 . . . .

Thus, there were two mechanisms through which plaintiff would be entitled to a contingency fee: (1) a 20% fee for any damages recovered on specified claims and (2) a percentage of earned net income (up to $500,000) from the well complexes. It is undisputed that plaintiff provided all of the legal services required of it for Remus. It is also undisputed that plaintiff did not recover damages under the agreement on specific claims for which it would have been entitled to a 20% fee under (1). Defendants also assert, however, that Remus did not earn any net income from either well complex and that, as a result, there was no percentage of funds to which an equitable lien on behalf of plaintiff could attach under the explicit language of their agreement.

As previously indicated, the jury in this matter was to decide whether plaintiff was entitled to an attorney's lien (or charging lien) and it determined that plaintiff was not. The trial court was charged with determining at trial whether plaintiff was entitled to an equitable lien. An equitable lien arises from an agreement that both identifies property and evidences an intention that such property serve as security for an obligation. *Warren Tool Co*, 11 Mich App at 281. The property may be a fund that is not yet in existence. If the parties agree that a clearly identified fund secures an obligation, that agreement gives rise to a lien upon the fund. *Id*. at 294. "The lien attaches not later than when the fund comes into existence or comes under the

control of the promisor who has charged it with that obligation. The promisor takes the fund in accord with the agreement 'as trustee as soon as he gets a title to the thing.' " *Id*., quoting *Barnes v Alexander*, 232 US 117, 121; 34 S Ct 276; 58 L Ed 530 (1914). "The form or particular nature of the agreement which shall create a lien is not very material, for equity looks at the final *intent* and purpose rather than at the form; and if intent appear to give, or to charge, or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be *sufficiently identified*, the lien follows." *In re Estate of Moukalled*, 269 Mich App at 720. However, "[e]quity will create a lien only in those cases where the party entitled thereto has been prevented by fraud, accident or mistake from securing that to which he was equitably entitled." *Id*. at 721.

In imposing what it deemed to be an equitable lien, the trial court relied almost exclusively upon *Warren Tool*, 11 Mich App 274. In that case, the plaintiff, a tooling company, sought to hold the former president and general manager of Stephenson Industries (a now defunct company) personally liable for the diversion of funds that were supposed to have been used to pay plaintiff for services it had performed for Stephenson Industries. Stephenson Industries had accepted plaintiff's bid to provide tooling that Stephenson required for its contract with a company called Highway Products. Plaintiff was reluctant to accept Stephenson's credit for the tooling so required further assurance for payment. Stephenson thus directed a letter to its bank that stated when the check for payment from Highway Products was presented to the bank, the bank was to disburse payment to plaintiff. The bank acknowledged receipt and indicated that when payment was received from Stephenson in accordance with the letter, funds would be disbursed to plaintiff. Highway did issue the anticipated payment to Stephenson. However, Stephenson did not deposit the check with its bank. Instead, the president of Stephenson cashed the check elsewhere and issued the funds to others. The *Warren Tool* Court noted that "[t]o dedicate property to a particular purpose, to provide that a specified creditor, and that creditor alone, shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien." *Id*. at 284. Significant to the *Warren Tool* Court's determination that an equitable lien attached to the Highway check was the fact that not only did plaintiff and Stephenson agree that the specific check would act as security, but that the specific check came into existence and came into Stephenson's hands, but that Stephenson then deliberately diverted the check and did not use it for its specified, agreed upon purpose. Importantly, the *Warren Tool* Court also noted, "[h]ad Stephenson Industries been prevented by creditor action or bankruptcy from depositing the check, plaintiffs' claim would probably have remained inchoate or inoperative." *Id*. at 296. That is exactly what happened here.

From the plain language of the contingency fee agreement, plaintiff's fees were to be paid from a very specific source—"out of the net income (as earned) for each well complex." To the extent that any identifiable property served as security for Remus's obligation, then, it was the future net earned income of the wells. Because this was specifically identified property and the fact that the property, or fund, in this case, was not yet in existence was irrelevant, the trial court could have found that an equitable lien in favor of plaintiff attached to the earned net income of the well complexes.

But, there is no question that the wells never realized any earned net income. Prior to the wells changing hands from Remus and EDS to RDD, the wells were shut down due to lack of operating funds and due to lack of regulatory compliance. After the shutdown occurred, PFRS, a

creditor of Remus and EDS, foreclosed upon its interest in Remus. The specific body from which plaintiff was to be paid (earned income from the wells) *never* came into existence. Remus never had the funds which secured plaintiff's contingency fee and diverted them, as was the case in *Warren Tool*. Instead, Remus was prevented, by another creditor action and from lack of funds and regulatory shut down, from ever realizing any earned net income from the wells. Therefore, as indicated by *Warren Tool*, plaintiff's claim remains inchoate or inoperative.

Plaintiff has not identified a single case where an equitable lien had attached to specific identifiable property or funds that do not and will not exist in the hands of the creditor.

Summary disposition in favor of defendants on plaintiff's claim for an equitable lien was thus appropriate. Had summary disposition on this claim not been appropriate, entry of a judgment in plaintiff's favor on the claim would nonetheless have been inappropriate given the evidence at trial.

It was established at trial that the wells were not operational when PFRS took control over them and had not at that time earned any net income. At the time of trial (five years later) they were still not operational and were still not earning any net income. Testimony at trial established that PFRS did not take control of the project with any intent of running the project or the wells, had earned no net income from the wells, had not received payment on any of its loans or investments in the project and had, in fact, invested more than $5 million *more* in the project in order to keep the wells from violating any more environmental standards. Plaintiff elected to provide very specific contractual provisions setting forth a very specific source from which they were to recover its contingent fee from Remus. That source was net earned income from the wells. That source does not exist. Plaintiff did not identify any other understanding of the contract aside from its plain language or any other identified source from which the contingency payment was to come in order to justify an equitable lien. Thus plaintiff was not entitled to a judgment in its favor on the equitable lien claim.

We therefore vacate the trial court's December 21, 2011, Opinion and Order finding in plaintiff's favor on its claim of an equitable lien and remand to the trial court for entry of an order granting summary disposition in favor of defendants on plaintiff's claim for an equitable lien. Our finding that defendants' were entitled to summary disposition with respect to plaintiff's claim for an equitable lien renders defendants' remaining issues on appeal moot.

On cross appeal, plaintiff first contends that the trial court erred in denying its motion for summary disposition concerning its claim for an attorney's lien. We disagree.

As previously discussed, Michigan recognizes a common law attorney's charging lien on a judgment or fund resulting from an attorney's services. E.g., *Bennett v Weitz*, 220 Mich App 295, 297; 559 NW2d 354 (1996). An attorney's charging lien is "an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit." *George*, 201 Mich App at 476. As *Kysor Industrial Corp*, 11 Mich App at 444, quoting 7 CJS Attorney and Client § 211, p 1142 explains, " '[t]he special or charging lien of an attorney is an equitable right to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in that particular suit' " and " '[t]he lien is based on the natural equity that plaintiff should not be allowed to appropriate the whole of a judgment in his favor without

paying thereout for the services of his attorney in obtaining such judgment.' " Stated another way, the law creates a lien of an attorney upon the judgment or fund resulting from his or her services. *Aetna Cas & Sur Co v Starkey,* 116 Mich App 640, 644; 323 NW2d 325 (1982). "An attorney's lien is . . . a specific encumbrance on a fund or judgment which the client has recovered through the professional services of the attorney." *Id*. at 645.

An attorney charging lien only attaches to judgments or funds which are recovered *by the client* through the professional services of the attorney in that particular matter. The specific requirement that a client must recover the funds in order for the attorney lien to attach is readily observable in *Dunn v Bennett*, 303 Mich App 767; __NW2d __ (2013). In that case, the defendant hired the plaintiff attorney to represent him in actions brought against him by the IRS. The defendant had purchased a home from his father and had allegedly leased the property to his mother. The IRS maintained the transfer was made so that the defendant's mother could avoid a federal tax lien and thus sent the defendant a "Notice of Tax Lien," listing defendant as a "nominee or transferee" of his mother. The defendant hired the plaintiff to represent him concerning the IRS lien. The agreement specified an hourly rate and an initial retainer. The plaintiff represented the defendant for over two years in a federal lawsuit suit to remove the "Notice of Federal Tax Lien," ultimately reaching a settlement under which the property was sold. The settlement agreement provided that the IRS would collect $25,110.77 from the proceeds of the sale and the defendant would receive $40,110.77. During the course of the litigation, defendant paid approximately $20,000 for plaintiff's legal services, but refused payment of the remaining balance, an amount totaling $116,361.21. While the trial court found that the defendant breached its contract with plaintiff, it also found that plaintiff did not have a charging lien on the proceeds from the home sale. Citing 93 ALR 667, § 3, the Court stated, "We do not view this as a 'recovery' to which a charging lien may be attached." *Id*. at 773.

Significantly, the introduction to 93 ALR 667 states, "[A]n attorney has what is generally known as a particular, special, or charging lien on the judgment, decree, or award obtained for his client, for his services rendered in procuring it. . . . This right, though called a lien, rests not on possession, as in the case of the class of liens just discussed, but on the equity of an attorney to be paid his fees and disbursements out of the judgment which he has obtained, and is upheld on the theory that his service and skill produced the judgment, and in accordance with the principle which gives a mechanic a lien upon a valuable thing which, by his skill and labor, he has produced . . . ."

Plaintiff's client was Remus. Thus any charging lien could attach only to judgments or funds that Remus recovered through the professional services of plaintiff. There is no dispute that there are none. There is further no dispute that the licenses and permits acquired by Remus were not judgments or funds recovered by them as a result of plaintiff's professional services. Plaintiff did represent Remus in various zoning issues. However, it recovered no judgments or funds on behalf of Remus in these actions.

Plaintiff has directed this Court only to authority that affirms the basic fact that Michigan courts recognize a charging lien. However, absolutely no case cited by plaintiff supports its position that a charging lien attaches to anything other than judgment or money recovered by a client in a particular suit wherein counsel provided legal services. For example, plaintiff cites to *Matter of Fitterer Engineering Assoc, Inc,* 27 BR 878 (1983). In that case, the primary issue for

resolution was whether a claim for legal fees was secured or unsecured under the bankruptcy code. Relevant to the instant matter, a law firm provided legal services to Fitterer (the debtor) under a contract. The contract provided that as compensation "for services performed, the Law firm was to receive a percentage of the total gross moneys paid to FEA and Dr. Fitterer, jointly or severally, as compensation for or as settlement of any infringement or alleged infringement of Dr. Fitterer's patents, including interest. FEA also agreed to pay quarterly to the Law Firm 2 ½ percent of the net sales of FEA from the date of the contract and 50% of all moneys received from licenses other than those that were part of the infringement action." *Id*. at 879. Apparently, FEA received royalty payments as a result of a patent infringement case in which the law firm represented it. The law firm indicated that it should not fall into the category of unsecured claims for bankruptcy purposes because it holds a charging lien over the royalty fees payable to FEA, making the FEA a constructive trustee over the fees. The Court found that the law firm did have a charging lien over the royalty fees, in part, because "the services of the Law Firm operated substantially and primarily to secure the royalty payments. . . . It is from this fund the Law Firm seeks to be paid." *Id*. at 880. Thus, consistent with all other attorney charging lien cases, the law firm represented the client in a case in which a judgment or funds were awarded and the attorney was found to have a charging lien over those funds specifically recovered in the lawsuit as a the result of his legal services.

Plaintiff was not entitled to summary disposition on its attorney charging lien claim. And, the jury found as much. Defendants' claim that they were entitled to summary disposition in their favor on this claim, while correct, is moot.

Plaintiff next asserts that the trial court erred in granting summary disposition in defendants' favor on its claims of conversion, violation of the Uniform Fraudulent Transfer Act, and conspiracy. Plaintiff has provided no argument, analysis, or citation of authority, however, with respect to its allegations of error on the conversion and conspiracy claims. An appellant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims. *Mettler Walloon, LLC v Melrose Tp*, 281 Mich App 184, 220; 761 NW2d 293 (2008). We thus reject plaintiff's assertions of error on the conversion and conspiracy claims as abandoned on appeal. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

Turning to plaintiff's Uniform Fraudulent Transfer Act (MCL 566.31 *et seq*.) claim, we find no error requiring reversal. The Uniform Fraudulent Transfer Act (UFTA) permits a creditor to seek various remedies including avoidance, attachment and injunctive relief when a fraudulent conveyance has been made by a debtor. MCL 566.37(1). Plaintiff asserted in its complaint that the purported transfer of assets to RDD was made shortly after a substantial obligation was incurred to plaintiff, that little to no value was received in exchange for the transfer, that the transfer was directed and control by PFRS and that PFRS was an insider with respect to the transfer because it exercised controlled over the operations of the project. Plaintiff asserted that the conduct of PFRS and RDD in the transfer of assets was in violation of the UFTA. Plaintiff thus appears to have attempted to assert a claim pursuant to MCL 566.34. That statute provides:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made

or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:

(*i*) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(*ii*) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all of the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

The UFTA defines a transfer as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset," and

includes "payment of money, release, lease, and creation of a lien or other encumbrance." MCL 566.31(l).

The trial court granted summary disposition in favor of defendants on plaintiff's UFTA claim because plaintiff failed to allege any actual intent on the part of defendants. We find no error in this conclusion. A claim under MCL 566.34(1)(a) requires that to establish a transfer made by a debtor is fraudulent as to a creditor, the debtor must have made the transfer "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." Plaintiff did not allege in its complaint that this occurred. Plaintiff, in fact, made no allegations with respect to the debtor--Remus. Instead, plaintiff focused its allegations in this claim on the actions of PFRS and RDD. Having made no allegations that the debtor (Remus) made the transfer with any intent to hinder, delay or defraud plaintiff, plaintiff has failed to state a claim under MCL 566.34(1)(a).

A claim under MCL 566.34(1)(b) requires that to establish a transfer made by a debtor is fraudulent as to a creditor, the debtor must have made the transfer without receiving a reasonably equivalent value in exchange for the transfer *and* that the debtor must have also done either of the following:

> (*i*) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
>
> (*ii*) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Again, plaintiff made no allegation in its complaint that either of the above occurred at all, let alone that the debtor (Remus) engaged in any of the above acts. Thus, as stated by the trial court, plaintiff failed to set forth a requisite element of its claim under the UFTA and, as a result, failed to set forth a claim upon which relief could be granted.

In its appellate brief, plaintiff also claims that the trial court erred in granting summary disposition in defendants' favor on its UFTA claim, citing MCL 566.35. However, the trial court specifically stated, "[t]he Court will not address the parties' arguments with respect to Section 5, MCL 566.35, since it has not been pleaded in plaintiff's first amended complaint." "[A]n issue is not properly preserved for appellate review when it has not been raised, *addressed, and decided* by the trial court." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005) (emphasis added). Thus, this issue is not preserved for review and we need not address it.

Plaintiff next alleges that the trial court improperly instructed the jury at the beginning of trial concerning successor liability. A trial court is required to instruct the jury in the applicable law and fully and fairly present the case to the jury in an understandable manner. *People v Rodriguez*, 463 Mich 466, 472–473; 620 NW2d 13 (2000). Jury instructions are to be reviewed in their entirety, and there is no error requiring reversal if, on balance, the theories of the parties and the applicable law were fairly and adequately presented to the jury. *Novi v Woodson*, 251 Mich App 614, 630-631; 651 NW2d 448 (2002), superseded on other grounds by MCL 213.55(3). Even if the instructions are somewhat imperfect, there is no error as long as they

fairly presented the issues to be tried. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law and the parties' theories. *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008). We review for an abuse of discretion the trial court's decision regarding supplemental jury instructions. *Grow v W A Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999). We "will not reverse a court's decision regarding supplemental instructions unless failure to vacate the verdict would be inconsistent with substantial justice." *Guerrero*, 280 Mich App at 660.

Prior to trial, before a jury was impaneled, each counsel submitted special jury instructions addressing successor liability. Defendants' submitted instruction contained exceptions to the rule against successor liability which contained the word "must", indicating that in order for the exceptions to apply, certain factors must be found rather than the factors having been merely considered. Plaintiff's submitted instruction contained a more general statement of successor liability law. At the start of trial, the court read both submitted instructions to the jury. The trial court also instructed the jury at the beginning of trial, "Because no one can predict the course of the trial, these instructions may change []at the end of trial. If so, you should follow the instructions given at the conclusion of trial."

At the conclusion of trial the trial court provided only one instruction on successor liability, that being the one provided by plaintiff. The instruction set forth the exceptions to successor liability, but did not contain the "must" language set forth in defendant's submitted jury instruction. Assuming, without deciding, that defendant's preliminary instruction concerning successor liability was an incorrect statement of law, the jury was also instructed that if the instructions changed, it was to follow only those given at the conclusion of trial. The instructions did change and the jury was provided, during final instructions, only with plaintiff's proposed instruction concerning successor liability. Jurors are presumed to follow their instructions. *People v Mette*, 243 Mich App 318, 330–331; 621 NW2d 713 (2000). Thus there was no error requiring reversal.

Finally, plaintiff contends that the trial court erred in refusing to grant its motion for an *in camera* inspection of certain documents. We disagree. We review for an abuse of discretion a trial court's decision denying a discovery request. *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

Plaintiff submitted a document request seeking any documents generated from September 28, 2006, through November 7, 2006, by any attorney for PFRS that reflects any analysis undertaken or advice rendered with respect to: any attorney liens maintained or claimed by Warner Norcross & Judd, LLP or plaintiff; any fees generated by plaintiff or Warner Norcross & Judd, LLP based on work performed by them for EDS, Romulus, or Remus; any effort to transfer assets of EDS, Romulus, or Remus to PFRS or its designee; any decision to abandon the PFRS's planned acquisition of EDS's stock; and potential liabilities by EDS, PFRS or RDD to plaintiff or Warner Norcross & Judd, LLP; and the formation of RDD and how it may affect obligations to pay attorney fees to plaintiff or Warner Norcross. Defendants objected to the request based upon attorney-client and work product privileges.

At the time the request was submitted, all of plaintiff's claims were still active. These consisted of: Count I declaratory relief re: attorney lien; Count II declaratory judgment, equitable lien and/or equitable assignment; Count III declaratory relief that plaintiff has superior lien and/or security interest; Count IV declaratory judgment as to successor liability; Count V breach of contract/unjust enrichment; Count VI partnership liability; Count VII joint venture liability; Count VIII implied merger; Count IX conversion; Count X uniform fraudulent transfer act; and Count XI conspiracy to commit fraudulent conveyance.

The trial court ultimately dismissed Counts II and III as duplicative of Count I; Count V because defendants were not parties to the contract and were not unjustly enriched by plaintiff; Counts VI and VII because plaintiff failed to establish an agreement necessary to show a joint venture or a capital contribution necessary to show a partnership; Count VIII because it was duplicative of its successor liability claim; Count IX because plaintiff pleaded no exclusive right of ownership over the allegedly converted property, and; Counts X and XI because plaintiff failed to plead requisite elements of these claims. Thus, the materials that plaintiff sought to discover ultimately had nothing to do with the trial court's determination concerning most of plaintiff's claims.

The only claims that remained for jury trial after the dispositive motions concerned an attorney's charging lien and successor liability. As previously indicated, defendant was entitled to summary disposition on plaintiff's claim for an attorney's charging lien under the definition of the same. And, the jury ultimately found in defendant's favor on the same. Plaintiff's requested discovery would not change this legal fact. As a result, even if the trial court should have conducted an *in camera* review of the requested documents, the error is harmless.

We therefore vacate the trial court's December 21, 2011, Opinion and Order and remand to the trial court for entry of an order granting summary disposition in favor of defendants on plaintiff's claim for an equitable lien. We affirm the remainder of the trial court's rulings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering